FILE COPY

APR.

IN THE

Supreme Court of the United States

October Term, 1931

No. [redacted] 412

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

GEORGE P. PARKER,

Attorney General of the State of Utah.

MAHLON E. WILSON,

Attorney for Independent Coal & Coke Company.

INDEX TO PETITION

SUBJECT INDEX

	PAGE
Petition for Writ of Certiorari:	
Date of Opinion (R. 592)	1
Effect of Decree of Circuit Court of Appeals:	1
Annihilates State's Interest	1
Consequences of Precedent	1
1. Adjudicates rights of States in suits between private persons	1
2. Destroys effect of Statute of Limitations	1
3. Retrospective Fraud	1
Jurisdiction of Court:	2
Writ Authorized by Section 240 of Judicial Code	2
Land Value Approximately $500,000	2
Questions of law great Public Importance	2
Disturbs Stability of Land Titles	2
Finality of Decree: January 14, 1931	2
Statement of Facts:	2
Lands Certified to State under Act of July 16, 1894	2
Contract of Sale with Milner	2
Land Classified non-mineral by General Land Office under well established rule	2
Rule changed 1914—ten years after certification	3
Action commenced January 7, 1907: Milner suit	3
Character of	3
Trial	3
Determination	3
State not a party	3
Assurances of Special Assistant Attorney General of U. S.	3-4
New Transaction February 10, 1920:	4
Sale of Lands to Carbon County Land Co.	4
Mortgage of State	4
Transaction between State and Independent Coal & Coke Co.	4
Taxes, Payment of	4
Action May 16, 1924 (case at bar):	4
Character of	4
Appellate Proceedings	5
Intervention of State	5
Counterclaim of United States v. State	5
Reply of State	5
Trial Court Determination	6
Substance of Decision of Court of Appeals	6
Specification of Errors	8
Reasons for Allowance of Writ:	11
1. Character of Parties	11
2. Character of Questions	11
3. Conflict with Decisions of this Court and General Law	11
4. Nullification of Sec. 8 of Act of March 3, 1891	11
5. Grave Doubt of Circuit Court of Appeals	13
6. Erroneous Interpretation of Nature of Action	14
7. Misapplication of Decisions of this Court	14
8. Disregard of Purchase Money Mortgage	14
9. Retrospective Fraud	15
Prayer for Writ	15
Request of Independent Coal & Coke Company	16

INDEX TO BRIEF

	PAGE
Statement	17
Opinion of Court	17
Jurisdiction	17
Specification of Errors	17-18
Summary of Argument:	18
Point I. The State is not concluded or estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party.	18
Point II. Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State, and has the effect of conferring ownership on the State.	18
Point III. The Certifications obtained by the State from the United States were not fraudulent, because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character. It became mineral in character only by reason of a change in the law made ten years after said certifications. The standard existing at the time the certifications were made should have been applied.	19
Point IV. Either the State should have been decreed to be the owner of the land or its right as the owner and holder of the purchase money mortgage should have been preserved.	19
Argument	20
Conclusion	33-36
Appendix:	
Opinion of Circuit Court of Appeals in United States of America v. Amalgamated Sugar Co., decided March 5, 1931 (not reported)	37-43

CASES CITED

	PAGE
Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68	12-21
Cadwallader v. Harris, 76 Ill. 370	12-21
Campbell v. Dick, 157 Pac. 1062 (Okla.)	13
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209	12-22
Carroll v. Green, 92 U. S. 509; 23 L. Ed. 738	13
Clancey v. Barker, 131 Fed. 161 (8th Circuit, 1904)	32
Cramer v. United States, 261 U. S. 219	30
Davey v. Dodge, 216 Fed. 722 (8th C. C. A.)	13-24
Diamond Coal & Coke Co. v. United States, 233 U. S. 236	3
Elmendorf v. Taylor, 10 Wheat. 152; 6 L. Ed. 289	13-28
Hussey v. United States, 222 U. S. 88; 56 L. Ed. 106	22
Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 417	13-29
Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229	12-21
Landis v. Saxton, 105 Mo. 486, 24 Am. St. 403	29
La Roque v. United States, 239 U. S. 62	30
Lockhart v. Leeds, 195 U. S. 427	14-19-29-30
Milner v. United States, 228 Fed. 431; 248 U. S. 594	3
New v. Smith, 86 Kan. 1; 119 Pac. 380	13-29
Newsom v. Board, 103 Ind. 526; 3 N. E. 163	13
Robinson v. Hook, 4 Mason, 139; 20 Fed. Cas. 1017 (1826)	12-28
Speidel v. Henrici, 120 U. S. 377; 30 L. Ed. 718	13
State v. Cincinnati Tin Co., 66 Ohio St. 182; 64 N. E. 68	12-22
Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137	12-22
United States v. Amalgamated Sugar Co. (not reported)	24-37
United States v. Chandler-Dunbar Co., 209 U. S. 447; 52 L. Ed. 881	12-25-27
United States v. New Orleans Pac. Ry., 248 U. S. 507	14-19-29
United States v. Oregon Lumber Co., 260 U. S. 290; 67 L. Ed. 261	12
United States v. Whited, 246 U. S. 552; 62 L. Ed. 879	12
United States v. Winona R. Co., 165 U. S. 463; 41 L. Ed. 789	2-12-27-32
Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339	12-21

MISCELLANEOUS

	PAGE
Section 240, Judicial Code	2
Enabling Act, July 16, 1894	2
41 Corpus Juris; Sections 352 and 470, P. 458 and 528	14-33
Section 5682, Compiled Laws of Utah, 1917	21
Section 8, Act of March 3, 1891	23-24
3 Holdsworth's History of English Law	27

act, honest when done, can be made fraudulent by a retroactive application of a rule adopted ten years after the commission of the act.

JURISDICTION OF THIS COURT: This application for a writ of certiorari is made under Section 240 of the Judicial Code, (U. S. C. Title 28, Sec. 347.) The land involved consists of 5564.28 acres situated in Carbon County, Utah. In view of agreements attempted by various parties, as they are shown by the record, it is fair to state that the approximate value of this land is $100 per acre, or $556,428. The questions of law involved are not only of great but also of transcendent importance. If the decision of the Circuit Court of Appeals is sustained, then there is no security or repose in the title to a great portion of the land in the State of Utah, and the "benign influence" (U. S. v. Winona, 165 U. S. 463) of the Statute of 1891 has ceased to operate, and the attempted purchase of land in Utah is indeed precarious.

The decree of the Circuit Court of Appeals is final. Your petitioner's rights are cancelled and annulled, and nothing remains for determination as against your petitioner.

STATEMENT OF FACTS.

Under and pursuant to the floating grant contained in the Enabling Act of July 16, 1894 (28 Stat. 109), the 5564.28 acres of land involved in this controversy were selected by the officers of the State of Utah, and, after a due and regular investigation by the Commissioner of the General Land Office of the United States at Washington, and with the approval of the Secretary of Interior, the titles to said lands were certified to the State of Utah between the years 1901 and 1904, and one Stanley B. Milner, and other persons associated with him, entered into a contract with the State of Utah for the purchase of said lands at the price of $1.50 per acre. Said contract of purchase was then assigned to the Carbon County Land Company, a corporation in which Stanley B. Milner owned approximately all of the capital stock.

At the time of the purchase of said lands, and according to the rule then being enforced by the General Land Office of the United States, said lands were classified as non-mineral in character because there were no exposure of any coal hav-

ing a commercial value on any sub-division of the lands selected and certified, but because of a decision of this Court made in 1914 (Diamond Coal & Coke Co. v. United States, 233 U. S. 236), said lands were found to be mineral in character in 1914. (See Milner v. U. S., 228 Fed. 431; 248 U. S. 594.)

The United States commenced an action on January 7, 1907, against the said Milner and the Carbon County Land Company for the cancellation of said contracts of sale, alleging that the lands were mineral in character and did not pass under the grant to the State, and that the certifications from the United States to the State of Utah had been procured by fraudulent misrepresentations of the Milners, and that by reason thereof the certifications made by the United States were void, and that the possession of the lands should be restored to the United States, and that all clouds on the title of the United States should be removed.

This suit was tried in January, 1910, but was not determined by the Trial Court until June, 1914, a short while after the final decision of this Court in the case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, decided April 6, 1914. The decree of the Trial Court in the Milner case decreed the United States to be the owner and entitled to the possession of the lands involved and quieted its title against the defendants and their privies to that suit and perpetually enjoined the defendants from thereafter asserting any claim to said lands. This decree was affirmed by the Circuit Court of Appeals November 15, 1915. (228 Fed. 431.) Appeal dismissed. (248 U. S. 594.)

The State of Utah was not made a party to said Milner suit, and, of course, could not have been made a party, because the Trial Court had no jurisdiction to determine the rights of the State of Utah in said litigation without the consent of the State of Utah. It might have intervened, but it did not—perhaps because the Special Assistant to the Attorney General who commenced and carried on the Milner suit appeared before the State Land Board of the State of Utah on the day following the institution of said Milner suit, and assured the State Land Board that the United States sought nothing further by said suit than to set aside the Milner contracts and relieve the State from such contracts, and

that if the Government won the suit the title to the land would be in the State, and that the Government did not seek to deprive the State of its title. (R. 245-246). (See stipulation, R. 259)

No further proceedings or transactions were had with reference to said land until the year 1920, when the State of Utah issued its patent, bearing date February 10, 1920, to the Carbon County Land Company, conveying said lands to said grantee for the sum of $556,428, to be paid as follows: $100,000 on or before January 2, 1930; $200,000 on or before January 2, 1940, and $256,428 on or before January 2, 1950. The respective amounts of this indebtedness were evidenced by promissory notes, which were secured by a mortgage made covering the land. (R. 366-369; R. 556-559). All of the notes bear interest on and after January 2, 1925, at the rate of five per cent. until maturity and eight per cent. thereafter until paid.

In October, 1920, the Carbon County Land Company sold 1120 acres of the land in question to the Independent Coal & Coke Company, a corporation organized and existing under the laws of the State of Wyoming but operating coal mines in Utah in the vicinity of the lands in question. The Independent Coal & Coke Company gave to the Carbon County Land Company approximately 365,000 shares of its capital stock, having a par value of $365,000, and an actual value, according to the record, of at least 60c per share, and assumed an indebtedness for $112,000 standing against the 1120 acres of land in favor of the State of Utah. The Independent Coal & Coke Company and the State of Utah entered into an agreement whereby the State of Utah was to convey the 1120 acres to the Independent Coal & Coke Company immediately upon the said Company paying to the State the said sum of $112,000. (R. 391, 407.) (See Deed, R. 417)

The Independent Coal & Coke Company entered into the possession of the 1120 acres of land and paid approximately $40,000 in taxes to the State prior to the institution of this suit in 1924. (R. 99)

On May 16, 1924, the United States brought this action against the Carbon County Land Company and the Independent Coal & Coke Company. The bill sought to have the Carbon County Land Company and the Independent Coal &

Coke Company declared constructive trustees of the land involved and to have the parties ordered to reconvey the title to the land to the United States. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. (United States v. Carbon County Land Co., 9 Fed. (2d) 517.)

This Court then granted a writ of certiorari and permitted the State of Utah, your petitioner, to appear in support of the writ. The decision of the Eighth Circuit Court of Appeals was affirmed by a divided court. (274 U. S. 640.)

On the return of the mandate of this Court to the United States District Court for the District of Utah, the original bill of complaint was amended. The State of Utah then intervened and set up its mortgage, and prayed that its title be quieted as against the United States.

The United States, after making unsuccessful objections to this intervention on the part of the State, then filed its answer to the complaint in intervention, and also its counter-claim against the State of Utah. (R. 68)

COUNTER-CLAIM OF UNITED STATES: In this counter-claim, it claimed the title to the land, and prayed, among other things, that the Court adjudge and decree that the certifications of said land "so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same." (R. 84-85)

REPLY OF STATE: To this counter-claim, the State of Utah replied, denying that in substance the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that said lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that said lands were of a known mineral character. Said reply re-affirmed the allegations contained in its complaint in intervention, and finally alleged that the cause of action set forth in the counter-claim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which in substance provides that all actions to vacate or annul patents shall be

commenced within six years after the date of the issue of such patents. The State of Utah then prayed "that the United States take nothing by reason of said counter-claim; that said counter-claim be dismissed for want of equity, and * * * that the lands described in said counter-claim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief. (R. 89)

Upon a hearing the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the lands in controversy. The Circuit Court of Appeals, by its opinion and its decision, reversed that decree, holding that it should operate as a cancellation of the lien of the mortgage held by the State and of any tax deeds or liens thereon, and that the title of the United States should be quieted, and that the State, or anyone claiming under it, should be enjoined from asserting any claim to the title or possession of the premises.

SUBSTANCE OF DECISION OF COURT OF APPEALS.

The holding of the Circuit Court of Appeals, in reversing the judgment of the District Court, is predicated upon the following propositions: (Opinion R. 592)

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of facts.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitation prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by the Carbon County Land Company and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against the Carbon County Land Company or the Independent Coal & Coke Company.

6. That because the State had parted with its title, and its interest was thereafter represented by a purchase money mortgage, then as the mortgagee therein it held under the Carbon County Land Company, and that the State of Utah was a privy in title to the Carbon County Land Company, and was therefore bound in equity by the decree of 1914, entered in a suit to which the State was not a party and to which it could not have been made a party without its consent.

7. That although the cross-bill of the United States against the State prays for a cancellation of the certifications made by the Government, still the primary relief sought against the State is the same as that against the Companies, viz: to impress a trust on such title as it has, in aid of the 1914 decree, and the statute therefore does not bar the action.

8. That the State has no just claim to these lands, and that the State's position in this case "is not entirely worthy of it". (Quoting Court's opinion.) (R. 593)

9. That the decree of 1914 does not merely set aside the contract of sale made between the State and the Milners, but prevents the Milners and their successor, the Carbon County Land Company, from asserting any claim under the certifications which they have fraudulently procured.

10. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907; that only the Congress of the United States could provide for the disposition of the lands of the United States.

11. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

12. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit made in 1914 is binding upon the Court of Appeals.

SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in holding that as to your petitioner, the State of Utah, the land involved were known mineral lands, and erred in ignoring the fact that said lands were by the standard of law, in force at the time of the certification by the United States to the State of Utah, non-mineral in character, and erred in failing to apply the standard of law which existed at the time of the certifications were made by the United States to the State of Utah, and for the same reason erred in finding that there was a material misrepresentation of the facts as to the character of said land.

2. That the Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon Milner and his corporation and not upon any title held by the State of Utah.

3. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate and annul a patent or a certification.

4. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with a reconveyance of the title to land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification, or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and and annulment of the grant in whatsoever form.

5. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basic foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than

for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

6. That the Court erred in failing to give effect to the interest of the State of Utah in the land involved, which interest was the entire purchase price of said land; and erred in failing to appreciate that the State of Utah was still in law seized of the land involved, to the same extent as it has been at any time since the certifications were made by the United States.

7. That the Court erred in holding that the State's rights in the land came from or were held under the Carbon County Land Company, and in failing to recognize that the State's rights in said land came from the United States, under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was a successor to the Carbon County Land Company or a privy to that Company; and erred in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved, in partial satisfaction of the grant made in said Enabling Act.

8. That the Court erred in holding that the State is "under the peculiar circumstances and under the doctrine of the Williams case, bound in equity" by the decree of 1914, when it is conceded that not only was the State not a party to the suit in which that decree was made, but that it could not have been made a party without its consent.

9. That the Court erred in failing to appreciate that the State as well as the United States is clothed with and entitled to the immunities and privileges of a sovereignty, and that while the United States can convey its lands only by means of the rules provided by its Congress, the State of Utah can convey its lands only by means of the rules provided by its legislature, and that neither of the sovereignties can do more or less than follow its law.

10. That the Court erred in holding that the primary relief sought against the State is to impress a trust on the title to the land involved, in aid of the 1914 decree, because no trust could be nor was any imposed upon the State of Utah by the Circuit Court of Appeals. So far as the State is con-

cerned, the decree of that court goes no farther than to cancel and annihilate the State's interest in the land.

11. That the Court erred in holding that the State has no just claim to these lands, and in intimating that the State's position "is not entirely worthy of it", because it appears from the record that these certifications made by the United States to the State have for more than twenty-five years been treated by both the State and the United States as a partial satisfaction of the grant made in the Enabling Act.

12. That the Court erred in holding that the decree of 1914 had any other or greater effect than to annul the interest of Milner and the Carbon County Land Company as it existed at the time of the entry of that decree; and erred in assuming that this Court intended to hold that the Carbon County Land Company could not, by means of a new, fair and lawful transaction, buy this land from the State if it was the owner thereof, or from any other person who might own said land.

13. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit; that now to claim that the State is concluded by the decree entered in the Milner suit permits the United States to reap an unjust advantage from the misconduct of its representative.

14. That the Court erred in holding that the United States was not guilty of laches, because, regardless of its legal effect and legal consequence, the conduct of the United States in suffering the long delay before commencing its action of 1924 was from any standpoint inexcusable and highly detrimental to both the State and to every citizen thereof. This question might well have been settled years ago had the United States assumed a different attitude.

15. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

REASONS FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. The real controversy is between the State of Utah, your petitioner, and the United States. Because of the sovereign character of such parties and because of the provisions of the Constitution providing for the original jurisdiction of this Court in suits where a State is a party, such a controversy should not be determined without a review by this Court. No other Court than this Court could acquire jurisdiction of a controversy between the United States and your petitioner without the consent of each and both of said parties. That consent has been given by the United States bringing this suit and by the State voluntarily intervening in such suit, and particularly by the United States filing its counterclaim against the State and the State replying thereto. Therefore, considering only the character of the parties involved in the real controversy, it is submitted that the judgment complained of should be reviewed.

2. But, disregarding the character of the parties, and looking only to the character of the questions involved, the great and transcendent public importance of the decision of the Circuit Court of Appeals, it is submitted, compels a review by this Court because the decision of said Court makes uncertain and insecure the titles to real estate, especially within the State of Utah and throughout all the public land States. All titles rest more or less upon a repose resulting from the Statute of Limitations, and when once it is held that Section 8 of the Act of March 3, 1891, can be avoided by an action seeking to establish an implied or constructive trust, as contradistinguished from an action for formal annulment of a patent, then the purpose of that statute has failed, or has ceased to operate, and the title to land has become insecure and its acquisition fraught with great danger. The public importance of such a question cannot be over-estimated.

3. The decision of the Court of Appeals, holding that the State of Utah is bound by the decree entered in favor of the United States and against the Carbon County Land Company, et al., in the year 1914, is in conflict with the decisions of this Court and in conflict with the general law, because

IN THE

Supreme Court of the United States

October Term, 1931

No.....

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Utah complains of the decree of the United States Circuit Court of Appeals of the Tenth Circuit entered in that court on January 14, 1931, and respectfully petitions for a writ of certiorari to review the same as against the United States of America, respondent above named. (R. 592)

EFFECT OF DECREE: Said decree, when considered in connection with the opinion of the Circuit Court of Appeals, cancels and annuls all right, title and interest of your petitioner in the land which is the subject of this litigation. As a precedent, it establishes: (1) that a state may be bound in equity by decree entered in a suit to which that state was not and could not have been made a party, without its consent; (2) that a statute of limitations barring actions to vacate or annul grants of land made by the United States, enacted for the purpose of making safe and secure the title to such lands, may be avoided by an action commenced to impress such land with a constructive trust, and letting the decree therein have the effect of a reconveyance; (3) that an

the State was not a party to the suit which resulted in said decree, and because the State could not have been made a party to such suit without its consent.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Ohio St. 182; 64 N. E. 68.

These cases hold in substance that the record in the Milner suit does not estop the State and will not be evidence against it for any purpose touching the merits of its claim.

4. The decision of the Court of Appeals, in holding that Section 8 of the Act of March 3, 1891, does not apply in favor of the State because this suit is one to have the land impressed with a constructive trust, or because it is in aid of a former decree, is untenable and in conflict with the great weight of authority, and in conflict with the applicable decisions of this Court and in conflict with the general law, because this statute of limitations gives a right meritorious in character, and its application does not depend upon the character of the remedy adopted or the nature of the forum chosen, and the rights created by it cannot be sacrificed to any mere form of remedy selected by the complainant.

United States v. Whited, 246 U. S. 552; 62 L. Ed. 879;
United States v. Winona, 165 U. S. 463; 41 L. Ed. 789;
United States v. Oregon Lumber Co., 260 U. S. 290; 67 L. Ed. 261;
United States v. Chandler-Dunbar Co., 209 U. S. 447; 52 L. Ed. 881;
Robinson v. Hook, 4 Mason, 139; 20 Fed. Cas. 1017 (1826).

(Opinion of Justice Story: Statute of Limitations bar against constructive trusts.)

Elmendorf v. Taylor, 10 Wheat. 152; 6 L. Ed. 289;
Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 417.

(Opinion by Justice Kent.)

New v. Smith, 86 Kan. 1; 119 Pac. 380.

(Substance and not form of action decisive in the application of a statute.)

Campbell v. Dick, 157 Pac. 1062 (Okla.);
Newsom v. Board, 103 Ind. 526; 3 N. E. 163;
Speidel v. Henrici, 120 U. S. 377; 30 L. Ed. 718;
Carroll v. Green, 92 U. S. 509; 23 L. Ed. 738.

These authorities, it is believed, establish the proposition that a statute of limitations, although in form barring a remedy, in substance creates a right, the existence of which cannot be avoided by choosing one form of a remedy as contradistinquished from another. The application of the bar created by the statute is not prevented by the fact, if it be a fact, that the proceeding is in aid of a former decree, where such proceeding brings in a new party.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

(It is difficult to see how there can be an affirmation of the certifications if such affirmation is immediately followed with the creation of a constructive trust, accompanied by an order for reconveyance. See opinion of Circuit Judge Carland in Davey v. Dodge, 213 Fed. 729.)

5. It is apparent from the opinion of the Circuit Court of Appeals rendered in this case, and the opinion rendered by the same Circuit Court of Appeals in the case of United States v. Amalgamated Sugar Company, decided March 5, 1931, a copy of which is hereto attached, that said Circuit Court of Appeals was in grave doubt or, to quote from one of the opinions, "had serious misgivings" about the determination of the question of law as to the application of Section 8 of the Act of March 3, 1891, and that "if this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action". (Quoting from Circuit Judge McDermott's opinion in the Amalgamated case.)

6. The decision of the Circuit Court of Appeals has misinterpreted the action as between the State of Utah and the United States, in holding that the suit as between said parties was in aid of a former decree, because it is apparent from the Counter-claim of the United States (R. 68) and the Reply of the State (R. 87-89) that as between such parties the controversy is one of an original character to cancel the certifications made by the United States to the State of Utah pursuant to the Enabling Act. The ownership of these certifications and of the title conveyed by them was vested in the State of Utah at the time of the Milner suit, and for many years after the date of the decree in that suit, and could not have been adjudged or determined in such suit, because the State of Utah was not a party thereto. To reach that subject required an original suit, as contradistinguished from one of an ancillary character. The counter-claim of the United States and the reply of the State constitute an original suit.

7. It is apparent from the opinion of the Court in the case at bar, and especially from the opinion in the case of United States v. Amalgamated Sugar Company, decided by the Circuit Court of Appeals of the Tenth Circuit on March 5, 1931, that said Circuit Court of Appeals, in holding that the Statute of Limitations did not apply because the suit was one to impress the land involved with a constructive trust, erroneously relied upon two decisions of this Court; Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pacific Ry., 248 U. S. 507, when neither of such cases can by any possibility affect the question being presented. Where the Government brings a suit to protect the rights of third parties, of course the statute does not apply.

8. It is believed that the decree of the Circuit Court of Appeals ignores the general rule of law conceded everywhere, that in the absence of statute to the contrary, a purchase money mortgage has priority over a previously docketed judgment against the mortgagor, and when the Circuit Court of Appeals subordinated the State's mortgage to the judgment and decree rendered against the Carbon County Land Company, in 1914, it failed to appreciate that the legal and practical effect of the transaction between the State and the Carbon County Land Company was to convey to the latter company an equity of redemption only, and leave the title to the land in the State. 41 C. J., Pages 458 and 528, Sections 352 and 470 of Mortgages.

9. It appears that the certifications were not tainted with any fraud at the time they were made, and that, according to the then existing standards, their validity was beyond attack. It is believed that the Circuit Court of Appeals, by its decree, has, in violation of fundamental principles generally accepted, transformed an act, honest when done, into a fraudulent one, by a retroactive application of a technical rule first declared by this court long after the date of said certifications.

These questions have been decided, it is believed, in conflict with the general law in a way that is untenable and in violation of the prior decisions of this Court. The decree, of which a review is sought, constitutes an extraordinary departure from the usual course of judicial proceedings.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals had in said cause entitled "United States of America, Appellant, vs. Carbon County Land Company, a corporation, and Independent Coal & Coke Company, a corporation, Respondents, and State of Utah, Intervener, No. 248", to the end that said cause may be reviewed and determined by this Court, as provided by law, and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit herein may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

STATE OF UTAH,

By GEORGE P. PARKER,
Attorney General of the
State of Utah.

The Independent Coal & Coke Company joins in the foregoing petition of the State and requests that the same be granted as prayed for.

INDEPENDENT COAL & COKE CO.,

By MAHLON E. WILSON,
Attorney for Independent Coal & Coke Company.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The record contains a large amount of immaterial and unnecessary matter, with the usual resultant inconvenience and useless expenditure for printing, amounting to $769.36 (R. 601), but its settlement in its present form was made at the instance of the United States, by the Trial Court, over the objection of your petitioner and the defendants. (R. 564-569)

OPINION OF COURT. The opinion of the Circuit Court of Appeals of the Tenth Circuit was rendered January 14, 1931. (Not yet reported. It appears in the record at Pages 592-597.)

Another opinion by the same Court, involving the same question relative to the application of the Statute of Limitations, in another pending cause, to-wit: that of United States v. Amalgamated Sugar Company, decided March 5, 1931 (not yet reported) is annexed, in an appendix. (Page 37)

JURISDICTION OF COURT. This application for writ of certiorari is made under Section 240 of the Judicial Code (U. S. C. Title 28, Sec. 347)

In the foregoing petition an attempt has been made to state all facts that are relevant to the questions involved, and the reasons for the allowance of the writ applied for, and also to specify the errors in detail which are claimed by your petitioner. For the purpose of this brief these errors may be summarized as follows:

SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals erred in finding and holding that the State of Utah is concluded and estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. (Decree affirmed by Circuit Court of Appeals of Eighth Circuit in 1915, 228 Fed. 431. Appeal dismissed by this Court for want of jurisdiction, 248 U. S. 594.)

2. That said Court erred in finding and holding that Section 8 of the Act of March 3, 1891, providing that suits

by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, did not bar the United States as against the State of Utah.

3. That said Court erred in finding and holding that the land involved was known mineral land at the time of its selection by the State of Utah, and that the certifications made by the United States to said State were fraudulently obtained.

4. That said Court erred in finding and holding that the State of Utah was a privy to the Carbon County Land Company, and in cancelling and annulling the State's purchase money mortgage securing the payment of an indebtedness of $556,428.

Unless the State can maintain its contention contained in Specification No. 1, it concedes defeat. If Specifications Nos. 1 and 2 are both maintained by the State, then a consideration of Specifications Nos. 3 and 4 is unnecessary, because the defeat of the United States is inevitable.

SUMMARY OF ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party.

The decision below, holding that the State was concluded and estopped by such decree, destroys the sovereignty of the State and violates Article III of the Federal Constitution, and is contrary to and in conflict with all prior decisions of this and every other Court, both Federal and State.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State, and has the effect of conferring ownership on the State.

The decision of the Court below is contrary to and in conflict with the prior decisions of this Court, and is predicated upon two Supreme Court decisions, Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pac. Ry. Co., 248 U. S. 507, neither of which is applicable to the case at bar.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States were not fraudulent, because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character. It became mineral in character only by reason of a change in the law made ten years after said certifications. The standard existing at the time the certifications were made should have been applied.

The decision of the Court below, holding that the certifications were fraudulent "in a legal sense" (quoting the Court's opinion, R. 596), rests not only upon an erroneous application of the doctrine of res judicata to the State, but also upon a retroactive application of a standard adopted ten years after the certifications were made, and is in conflict with the general law of the land, which in substance requires that the legality of an act shall be determined by the standards existing at the time of its commission.

POINT IV.

PURCHASE MONEY MORTGAGE.

Either the State should have been decreed to be the owner of the land or its rights as the owner and holder of the purchase money mortgage should have been preserved.

The decision of the Court below, finding and decreeing an annulment of this mortgage, is an extraordinary departure from the accepted equitable principles and the usual course of judicial proceedings.

ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party.

If the decree entered in the suit of 1914 is conclusive and binding upon the State, then all prior discussion had since the commencement of this suit in 1924 about impressing the land involved with a constructive trust, has been mere intellectual exercise, and the suit of May, 1924, together with all the proceedings had either in the Trial or Appellate Courts, has been vain and useless, because a constructive trust cannot be established or created against a defendant who has not at least some semblance of title.

The first decree of the Trial Court in this suit dismissed the bill of the United States on the ground that the relief prayed for was barred by the Statute of Limitations. If the State is estopped by the decree of 1914, then the Trial Court's decision was erroneous only because it gave a wrong reason, and either the Circuit Court of Appeals or this Court should have affirmed the decision of that Court holding that the suit should have been dismissed, because neither of the defendants to that suit had any title whatsoever, and the United States should have been left to its remedy in ejectment and for damages, or to that remedy which was incident to the injunction contained in the decree of 1914. But neither the Circuit Court of Appeals of the Eighth Circuit nor this Court held that the decree of 1914 was binding upon the State. On the contrary an examination of the opinions rendered will reveal a determination that the State still retained title to the lands involved, and that the decree of 1914 did not affect the interests of the State.

The former decision of this suit assumed "that the legal title of the State was not affected by the decree in the first suit, although the United States, in an appropriate proceeding, might have procured the annulment of the certification at least within the period of limitations", but that decision also held that a bona fide purchaser, buying directly from the

State, would receive an indefeasible title. Such a holding precludes the thought, it is submitted, that the decree of 1914 estops or concludes the State, and therefore the decision of the Court below is in conflict with the former opinion of this Court. (274 U. S. 640)

It is also in conflict with many other decisions. Even as between private parties, where the relation of vendor and purchaser exists, a judgment against the purchaser is not conclusive on his vendor.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;
Cadwallader v. Harris, 76 Ill. 370;
Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229.

In order to make the judgment available, even to the grantee of the title, his covenantor must receive notice of the suit and have an opportunity to defend it. (Substance of opinion in Kapiolani case.)

Conceding some conflict in the authorities upon this question when it arises between private parties, there seems to be no conflict in cases involving either one of the States or the United States. The State of Utah could be sued by the United States for the cancellation of the certificates to the lands involved, only in the Supreme Court of the United States. Either the consent of the State to be sued in the Supreme Court of the United States by the United States or by another State has been given by the adoption of the Federal Constitution or that charter renders consent on the part of the State unnecessary. But a State cannot be compelled to appear in any other court, State or Federal, without its consent, and no person can represent it except by authority expressly given by law. The Attorney General in this case appears under and pursuant to authority vested in him and direction given to him by the Governor of the State of Utah, pursuant to the provisions of Section 5682 of the Compiled Laws of Utah, 1917.

If by using its officers in possession of its property, or its vendees of such property, and obtaining judgment against such persons, the State could be bound, then such State could be compelled to go into any court having jurisdiction of the private parties and litigate with such parties in defense of

its property, and the doctrine of immunity from suit without its consent would serve no useful function.

Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137.

Quotation from opinion of Mr. Justice Harlan:

> "The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

Hussey v. United States, 222 U. S. 88; 56 L. Ed. 106;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
State v. Cincinnati Tin Co., 66 Ohio St. 182; 64 N. E. 668.

The authorities are believed to be without conflict upon this question.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State, and has the effect of conferring ownership on the State.

This suit was brought May 16, 1924, against the Carbon County Land Company and the Independent Coal & Coke Company. By the bill the United States sought to impress a trust on the lands involved against those companies. Judgment was rendered in the Trial Court in favor of the companies on the ground that the action was barred by the Stat-

ute of Limitations under discussion. This judgment was reversed by the Circuit Court of Appeals of the Eighth Circuit (9 Fed. 2d, 518), and the decision of the Circuit Court of Appeals was affirmed in this court, three justices dissenting. (274 U. S. 640)

When the case was remanded to the Trial Court, your petitioner, over the objection of the United States, obtained leave to intervene, and set up what it believed to be its interest in the land involved, to-wit: a mortgage securing an indebtedness of $556,428, the entire purchase price of said lands. In its bill for intervention it prayed that its title to said lands be quieted as against all claims of the United States, and for all general, proper and equitable relief. (R. 33-41)

After unsuccessfully moving to strike the bill, the United States filed its answer and a counterclaim. (R. 65-68 et seq.) In this counterclaim the United States, among other things, prayed that the title of the United States in and to said lands be quieted as against all claims and demands of the State of Utah, and in the alternative, among other things, that the certifications of the lands made to the State of Utah be delivered up and cancelled, and that the Court, by its decree, cancel and annul the same.

This counterclaim against the State constitutes an original and independent suit by the United States against the State. It is not one in aid of a former decree.

To that counterclaim the State of Utah filed its replication, pleading, among other things, that the suit was barred by the provisions of Section 8 of the Act of March 3, 1891. (R. 87)

In and so far as the suit between the United States and the State of Utah is concerned, its subject is the title that was conveyed by the United States to the State by the certifications. That subject was unaffected by the suit brought in 1907, resulting in the decree of 1914, unless, of course, the decree of 1914 binds the State when it was not a party to the suit.

If the Carbon County Land Company, or any other party, was precluded by the decree of 1914 from taking the title to the land involved under the State Patent of 1920, in a new and independent transaction, then that State Patent is ab-

solutely void, as was held by the Trial Court. (R. 90) If, however, that State Patent has any effect, then the State's mortgage should function. The State should certainly not lose the benefit of its mortgage security because the Carbon County Land Company violated the injunction of 1914.

These statements are urged upon the Court for the purpose of establishing the fact that the suit brought by the United States in its counterclaim against the State was original and not in aid of any former decree.

But, independent of these considerations, the mere fact that a suit is brought in aid of a former decree does not prevent the application of a Statute of Limitations in favor of a party brought into such suit. It is well established law that a creditor or a claimant can reach generally, with the aid of equity, any property which the debtor might reach with the said aid, but the ancillary action against the new party to reach such property must be brought within the period prescribed by applicable statutes of limitation.

Davey v. Dodge, 213 Fed. 722, Eighth Circuit.

But it is said that this Statute of Limitations does not apply because the plea of limitation of six years is no obstacle to a suit to impress a trust on the title to land certified, and that "the primary relief sought against the state is the same as that against the companies,—to impress a trust on such title as it has in aid of the 1914 decree. That statute does not therefore bar this action." (See Opinion, R. 593.)

In the case of United States of America v. Amalgamated Sugar Company, argued the same day as case at bar, decided by the Circuit Court of Appeals of the Tenth Circuit March 5, 1931 (see opinion, Pages 33-36), Circuit Judge Lewis used the following language:

> "This view" (referring to the claim that the Sugar Company was a trustee ex maleficio) "if sustained renders the plea of limitation of six years in which to sue bad, for the uncancelled certification is no obstacle to the trusteeship which equity imposed when title was taken with notice of the fraud. The opinion in Lockhart v. Leeds, 195 U. S. 427, sustains appellant's contention on the point stated."

In a special concurring opinion in the same case, Circuit Judge McDermott says:

> "I concur in the opinion of the Court with serious misgivings."

And again, after quoting Section 8 of the Act of March 3, 1891, he says:

> "The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands. The statute applies although the patent was procured by fraud. United States v. Winona, etc., R. Co., 165 U. S. 463, 476. If this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action."

And, after quoting from the opinion in the Chandler-Dunbar case, 209 U. S. 447, he says:

> "This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title. True, the latter action saves the rights of bona fide purchasers; but those generally are saved by other sections of the statute. The situation is aggravated when, as in the case at bar, the form of the action is one to vacate the certification."

In the concluding part of his opinion he says:

> "But the case of United States v. New Orleans Pac. Ry. Co., supra, is analogous on the facts, and the decision is clear-cut. While the result seems to be to enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative, and therefore concur."

There are several answers to the contention that the effect of the statute may be thus avoided. In the first place, the suit as against the State, presented by the counterclaim of the United States, was to vacate and annul the certifications—not to declare a trust, and while the Circuit Court of Appeals held that "the primary relief sought against the State" was to impress a trust, no such relief was, or, it is submitted, could have been, granted against the State. The State was not guilty of any fraud. The State did not obtain the title from the Carbon County Land Company, but it obtained its title by certification from the United States at a time when it was being held by the General Land Office at Washington that this land was non-mineral in character. No decree, it is submitted, could have been made against the State, declaring it a constructive trustee, and an examination of the mandate and the decree of the Circuit Court of Appeals shows nothing further as against the State than that "the decree should operate as a cancellation of the lien of the mortgage held by the State and of any tax deeds or liens thereon. The title of the United States should be quieted. The defendants and the intervener, or anyone claiming under them, should be enjoined from asserting any claim to the title or possession of the premises." (R. 596)

It is true that the defendant companies are ordered to convey to the United States, but it is provided "failing which the decree should operate as a conveyance." (R. 596)

The substance of this decree, it is submitted, is a vacation and annulment of the certifications. It is undoubtedly true, generally speaking, that the Court may grant proper relief, although such relief is at variance with the theory disclosed by the specific prayer of the bill; but it is also true, it is submitted, that the application of the statute under consideration is to be determined by matters of substance rather than form.

Where two concurrent remedies exist, and one is barred by the statute, equity is compelled to bar the other. This is true of legal and equitable actions; a fortiori of two equitable remedies; especially so where the one, a constructive trust, necessarily includes all the essentials of the other. No such trust can be declared without vacating and annuling both the form and the substance of the grant. If the latter is affirmed, it stands (213 Fed. 722) and is an immovable obstacle to the creation of a constructive trust. If a trust is declared the

grant is annihilated. The statute should not be sacrificed to any such a fiction as a constructive trust. Such a trust is a mere assumption—not a fact—indulged in not as an end but to work out another purpose—in this case to bring about a vacation of the grant.

This statute, like all other statutes of limitations as to land, gives a substantive right. In form it cuts off a remedy, but in substance it preserves and protects seisin, "because the person seised is owner till someone else proves a better right to seisin." (3 Holdsworth's History English Law, 93). This statute creates a rule of property—not one of procedure—and the decisions of this Court have so held.

United States v. Winona, 165 U. S. 463.

In that case it was claimed that the certifications were procured by fraud, but this Court applied a section of this identical legislation to the certification and held that the title of the purchaser had been confirmed, treating the words "patent" and "certification" as synonymous.

United States v. Chandler-Dunbar Co., 209 U. S. 447-450.

In this case the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The United States replied that the action was not one to vacate and annul a patent but to quiet title. This contention of the Government was not sustained, the Court using the following language:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

Robinson v. Hook, 4 Mason 132; 20 Fed. Cas. 1017, decided by the Circuit Court for the District of Maine in 1826, Circuit Justice Story rendering the opinion. He said:

> "But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted, that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases, like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar, and may be pleaded to a suit in equity as well as at law."

He cites Elmendorf v. Taylor, 10 Wheat. 152, decided by Chief Justice Marshall in 1825. Quotation from syllabus:

> "Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired."

In his opinion Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, "strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who are not permitted to do anything adverse to it." They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

To avoid the Statute of Limitations, because of a trust, the latter must be of a technical and continuing character, which falls properly and peculiarly within the exclusive jurisdiction of a court of equity.

Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 411.

This decision was rendered by Chief Justice Kent in 1823. The courts throughout this country have always regarded it with great respect because it is an exhaustive discussion of the authorities and principles relating to the application of statutes of limitation to cases where a trust is involved. From it, one is compelled to deduce the principle that the statute barring a concurrent remedy cannot be avoided by merely seeking to establish a constructive trust.

New v. Smith, 86 Kan. 1; 119 Pac. 380.

The Court said:

> "Looking beyond mere form of the action to the real issue therein we hold that the action is an action for relief on the ground of fraud, and that the two-year limitation applies."

Landis v. Saxton, 105 Mo. 486; 24 Am. St. 403.

This case recognizes the principle that if the remedy of a constructive trust is merely concurrent with some other remedy, that is barred, then the statute applies with the same force to constructive trusts as it does to the concurrent remedy.

From these authorities, and the others cited in the petition, it is apparent that the decision of the Court below is in conflict with the prior decisions of this Court, which recognize the statute as creating a meritorious right, and also with the general law of the land as it has been established by the leading cases announced by the Courts.

But the Circuit Court of Appeals apparently relies upon Lockhart v. Leeds, 195 U. S. 427, and United States v. New Orleans Pac. Ry. Co., 248 U. S. 507.

Lockhart v. Leeds does not appear to throw any light upon the question of the application of the statute.

United States v. New Orleans Pac. Ry Co., supra, is not in point, because the United States was not suing to recover land which it owned or claimed to own, but it was suing to protect the rights of third parties, viz: homestead claimants; and where the United States bring a suit to protect the rights of third parties, or brings a suit to declare a forfeiture because of a breach of a condition subsequent, the statute, of course, could not apply. Such suits are illustrated by the following citations:

Cramer v. United States, 261 U. S. 219.

In this case suit was brought by the United States, acting in behalf of three Indians, and it was claimed that the suit was barred by the identical statute under consideration. Mr. Justice Sutherland said:

> "The object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties."

La Roque v. United States, 239 U. S. 62.

In this case it was urged that this statute barred the action, but this Court held that it had been determined that this section referred to patents issued for public lands of the United States, saying:

> "This trust patent was not issued for public lands of the United States but for reserved Indians lands, to which the public land laws had no application."

Without further citation of authority, it seems clear that cases wherein the United States is seeking to protect the rights of third parties, such as the New Orleans case, are not applicable to the question under consideration.

From the opinion in the Amalgamated case, which case was argued before the Circuit Court of Appeals immediately before the case at bar, the conclusion is inevitable that at least one member of the Circuit Court of Appeals had grave

doubts or "misgivings" as to the validity of the contention, and that he relied upon the New Orleans case. He conceded that the purpose of the statute had been defeated, and when such a concession is made, then there is no security as to land titles within any of the public land states. The situation is a deplorable one, and it is submitted that it is important that this Court should give a decisive answer to these questions. Its public importance cannot be stated too strongly.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States were not fraudulent, because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character. It became mineral in character only by reason of a change in the law made ten years after said certifications. The standard existing at the time the certifications were made should have been applied.

It appears from the opinion of the Court below that there was no exposure of any commercially valuable coal on any subdivision of the land selected; that at the time of the selection there was a rule of the General Land Office at Washington to the effect that without such exposure the lands could not be listed as mineral.

It also appears from the opinion of the Court below that Milner and his associates, in making their application to obtain this land for grazing purposes, had no moral turpitude, i. e. they were acting honestly in obtaining the lands by the only method that was at that time open to them under the law. It is true that as to Milner and the Carbon County Land Company "it has been adjudicated that, in a legal sense, they fraudulently obtained these lands from the United States" (opinion Court below, R. 596), but if that adjudication does not estop or bind the State of Utah, then the question is open for consideration here.

It was not until the decision of this Court, rendered in April, 1914, United States v. Diamond Coal & Coke Co., 233 U. S. 236, that the rule of the General Land Office was changed. A change of this rule made the lands involved mineral in character, and a retroactive application of the new

rule made that which was honest at the time of its commission fraudulent ten years later.

Clancey v. Barker, 131 Fed. 161 (8th Circuit, 1904.)

In this case Circuit Judge Sanborn used the following language. (Page 171):

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto statute."

United States v. Winona & St. Peter Railway Co., 165 U. S. 463, 41 L. Ed. 789.

Quotation from the opinion of Mr. Justice Brewer:

> "It belonged to the government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act."

The result is that when the State obtained these lands from the United States the certifications were not tainted with any fraud, either committed by the State or its officers or any other person. The lands at that time were merely grazing lands, as they were represented to be, and it is submitted that it is a fundamental principle of American law that the quality of an act is to be determined by the standards in force at the time of its commission. The mere fact that the Milners and the

Carbon County Land Company stand adjudicated, as is held by the Circuit Court of Appeals, does not prevent a decision on the merits as to the State of Utah, and it is submitted that the making of a retroactive application of the rule announced ten years after the certification of the lands is contrary to a fundamental principle generally conceded by men.

POINT IV.

PURCHASE MONEY MORTGAGE.

Either the State should have been decreed to be the owner of the land or its rights as the owner and holder of the purchase money mortgage should have been preserved.

It seems that the Trial Court found that the patent issued by the State of Utah to the Carbon County Land Company was void, and, in accord with the prayer of the Reply of the State, the Trial Court decreed these lands to the State. It is true that the State claimed a purchase money mortgage upon the lands, but the purchase money mortgage was for the full purchase price of the lands, to-wit: $556,428.

The Court of Appeals in effect held that the State claimed under the Carbon County Land Company and therefore cut off the lien of the mortgage. It is submitted that this was in conflict with the well known equitable principle that an owner of land does not lose his seisin or his right thereto by conveying the land, and in the same transaction taking a purchase money mortgage thereon to secure to him the payment of the purchase money to be paid. A purchase money mortgage has always been a favorite of a court of equity, and it would seem that the opinion of the Circuit Court of Appeals violated the general law of the land when it reversed the decision of the Trial Court, denied ownership in the State and cancelled the rights of the State in the land as security for the payment of amount due. 41 Corpus Juris, Sections 352 and 470, Pages 458 and 528 of Mortgages.

CONCLUSION.

It is said in the opinion of the Court of Appeals "That the State has no just claim to these lands is clear. It is in no sense a purchaser for value." (R. 593)

And again:

> "As a matter of fact, the state's position in this case is not entirely worthy of it. Asserting its own

innocence, it seeks now to appropriate the benefits of the misrepresentations of others and to secure valuable land which was not granted to it." (See opinion, R. 593)

The rules relative to valuable consideration and payment thereof do not and cannot apply as between the United States and the State with reference to the land involved. It is perhaps correct to say that the United States became the owner of such land by its treaty with Mexico and the State by the grant contained in the Enabling Act, followed by the certifications, but neither sovereignty paid any consideration for the land. The State could have selected its entire acreage of the floating grants immediately after Statehood if it had seen fit so to do. Until certification the United States held the land —not for purposes of mining or farming or grazing, but to be acquired by its citizens for appropriate purposes, and it has been the uniform and constant policy of the United States to encourage the settlement of public lands. The State, if permitted by this Court, will, under the grant, hold this land, or its equivalent in money, for educational purposes, in trust, so to speak, for the intellectual development of the younger generation. When the State took the land in the years 1901-1904, as is said in the opinion of the Circuit Court of Appeals, there was no moral turpitude either on its part or even on the part of Milner and his associates. Many lawyers and some Courts, according to the opinion, and the General Land Office at Washington, were holding that this land was agricultural and not mineral in character, because there were no outcroppings on the surface of any subdivision of said land. This rule was not changed until 1911 by the Circuit Court of Appeals of the Eighth Circuit, and not until April, 1914, by this Court.

When the suit against Milner was brought in 1907, by Mr. Maynard, the Special Assistant Attorney General of the United States, he convened the State Land Board in regular session and assured that Board that the United States did not seek to deprive the State of its title. Was it wrong for the State to believe him?

When the decree of 1914 was affirmed by the Circuit Court of Appeals in 1915, nothing was done which would indicate any purpose on the part of the United States to revoke the assurance of its representative made in 1907. In February, 1920, its then Governor and Attorney General and other

officers believed the State's title absolute. Reputable attorneys representing the Carbon County Land Company thought likewise, and the land was conveyed to the Carbon County Land Company by the State Patent dated February 10, 1920. That patent was immediately placed of record. Everybody involved seemed to be acting honestly and openly, however mistaken they may have been as to the law or as to their legal rights.

When the Independent Coal & Coke Company came into the transaction in October, 1920, its regular counsel gave an opinion that the title was good and marketable, and additional and independent counsel, emminent on the State Bench for many years and still eminent at the Bar of Utah, the Honorable C. W. Morse, gave a like opinion. He said, among other things:

> "If I am correct in the assumption that the selection by the State Land Board, and the certification under such selection by the Secretary of Interior, passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that the statute of limitations above referred to would inure to the benefit of the State of Utah, or anyone holding title under it to these lands." (R. 365)

All of the correspondence which passed between the Independent Coal & Coke Company and its attorneys was voluntarily produced on the trial of this cause, and there has never been any disposition on the part of the State of Utah, or the other parties to this suit, to conceal any of the facts of this transaction.

After these opinions were rendered, the Independent Coal & Coke Company delivered to the Carbon County Land Company approximately 365,000 shares of its capital stock, having an actual value of at least sixty cents a share, and entered into a contract with the State, whereby the State agreed to segregate the land bought by the Independent Coal & Coke Company from the operation of the mortgage of the Carbon County Land Company and to release that 1120 acres to the Independent Coal & Coke Company upon the payment by the Company to the State of $100 per acre for that land, or $112,000, which sum the Independent Coal & Coke Company assumed and agreed to pay to the State. It is clear

that the relation between the State and the Independent Coal & Coke Company became direct, and that from the time of this transaction the Coal Company was the vendee of the State. (R. 391) The Coal Company paid $40,000 in taxes. (R. 99)

When this suit, commenced May 16, 1924, was dismissed by the Trial Court and that decision reversed by the Circuit Court of Appeals of the Eighth Circuit, the State was impelled to and did apply to this Court to be heard, and when this Court remanded the cause for further proceedings, the State then waived its immunity and voluntarily intervened, over the objections of the United States. The officers of the State believed that its presence in the suit would permit the matters in issue to be fully and completely determined, and that such an important controversy should not be tried without the presence of all parties interested, regardless of immunity.

The Trial Court held that the State had the title because of the Statute of Limitations. It is not believed that it was wrong for the State to defend the ruling. A more appropriate method than that of appealing to the courts ordained for the purpose, by which the officers of the State could ascertain their duty as to the land involved, cannot be conceived. The importance of the questions involved, not only as they relate to the particular land, but also as they affect the title to land generally, must be conceded by everyone.

After all these proceedings the State now petitions this Honorable Court for a final review, submitting its claims and rights, if any, with unfaltering and respectful deference to that Court which has been ordained by the Constitution to have exclusive original jurisdiction of all suits where a State is a party.

It is submitted that the petition for the writ should be granted as prayed for.

Respectfully submitted,

GEORGE P. PARKER,
Attorney General of the State of Utah.

MAHLON E. WILSON,
Attorney for Independent Coal & Coke Company.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

No. 39—January Term, 1931.

United States of America, Appellant, vs. Amalgamated Sugar Company, a corporation, et al., Appellees.	Appeal from the District Court of the United States for the District of Utah.

[March 5, 1931.]

Mr. Charles R. Hollingsworth, United States Attorney (Mr. Seth W. Richardson, Assistant Attorney General, and Mr. Nat M. Lacy, Special Assistant to the Attorney General, were with him on the brief) for appellant.

Mr. Emmett M. Bagley (Mr. Robert L. Judd, Mr. Paul H. Ray and Mr. T. H. Devine were with him on the brief) for the appellee, The Amalgamated Sugar Company.

Before Lewis, Cotteral and McDermott, Circuit Judges.
Lewis, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order of June 30, 1928 dismissing appellant's amended bill of complaint, brought to recover eighty acres of land in Utah which had been certified to that state by the Secretary of the Interior and the Commissioner of the Land Office under Sections 12 and 13 of Act of July 16, 1894 (28 Stats. 110). The amended bill alleged that Godfrey Fuhriman, now deceased, and Ferdinand Zollinger, Jr., with others whose names are unknown to plaintiff, formed a plan to obtain title to certain lands of plaintiff, including the eighty acres here involved, by inducing said state to select the

said eighty acres and other lands under said statute by falsely representing that they were non-mineral in character, when they well knew said eighty acres contained valuable mineral deposits, to-wit, limestone; that Godfrey Fuhriman on or about April 3, 1903, made and filed with the state of Utah an application to purchase certain lands including the eighty acres, and in support thereof he, at the same time, made a false affidavit therein stating there were not within the limits of said land mineral deposits; that the state in reliance upon the representations made by the said Fuhriman and pursuant to said application did on or about April 10, 1903, file with the Commissioner of the General Land Office its selection list, including among the lands selected by it under said statute for the establishment and maintenance of an institution for the blind as provided in said act, the said eighty acres; and thereafter, on or about October 10, 1903, the Secretary of the Interior approved the selection of said eighty acres, and said eighty acres was on December 3, 1903, certified by the Commissioner to the state of Utah; that in approving and certifying said eighty acres the Secretary and Commissioner relied upon the false statements as to the non-mineral character of said land, and the statements and representations of the state of Utah as to its non-mineral character made by it at the persuasion of the said Fuhriman, believed said statements to be true and were in ignorance of their falsity and were deceived thereby when said approval and certification was made. That Fuhriman then induced the state to issue to him a certificate of purchase of the eighty acres; that in May, 1904, the state issued its patent conveying said land to one Badger who held the title for Fuhriman; that Badger conveyed to Fuhriman and Fuhriman conveyed to a corporation owned and controlled by him and Zollinger, and the corporation on November 13, 1914, conveyed the eighty acres to the Amalgamated Sugar Company, a Utah corporation, and "that at the time of said conveyance to said defendant, Amalgamated Sugar Company, as aforesaid, and at all times, the said defendant, Amalgamated Sugar Company, well knew the fraudulent manner in which the said land was acquired from the plaintiff as hereinabove alleged"; that the value of the eighty acres is $50,766.00; that during every year since 1905 the defendants had received or taken from the eighty acres limestone to plaintiff's damage of $79,655.00.

The bill prayed that the court decree the certification to the state, so far as it affects the eighty acres, to be null and void, that the eighty acres be decreed free and clear of all

claims of defendants and the title thereto revested in plaintiff as of original right and quieted against the claims and pretensions of defendants, that the Sugar Company be divested of its title and enjoined from setting up or claiming any right, interest or title thereto, and from creating any cloud upon plaintiff's title. It is further prayed that the plaintiff recover damages for the value of the limestone taken, but that in the event the court should not decree the title to be revested in plaintiff as of original right and quieted against the claims of defendants, and each of them, that the plaintiff in that event recover damages in addition to the value of the limestone, the value of said eighty acres, to-wit, $50,766.00. The suit was instituted twenty-two years after approval and certification of the eighty acres to the state. The Sugar Company, Zollinger and Fuhriman's administrator were made defendants.

Each defendant moved to dismiss the amended bill on several grounds, some going to the merits, and one that the suit was barred by the statute of limitations. Act March 3, 1891 (26 Stat. 1099) (U. S. Code, Title 43, Section 1166). That Act provides that suits by the United States to vacate and annul any patents shall only be brought within six years after the date of issuance of such patent. The court sustained the several motions on the ground that the statute in bar was applicable, and it ordered the suit transferred to the law side of the court and gave appellant twenty days within which to conform its pleadings to an action at law. Equity Rule 22. The plaintiff excepted to this action of the court but complied with the court's order and filed its complaint on the law side which in substance is a copy of the amended bill, except it only sought recovery of damages for the claimed value of the land, to-wit, $50,766.00. The Sugar Company filed a demurrer to the complaint on the law side which the court sustained on November 18, 1927.

In June of the next year appellant petitioned the court for leave to withdraw its complaint on the law side and to permit it to stand on its amended bill on the equity side. An order was entered granting the request and also dismissing the amended bill to which said motion to dismiss had been sustained on June 30, 1927, but no order of dismissal was then entered. Appellees have moved to dismiss the appeal on the ground that it was not taken in time. It was taken within three months after the order of dismissal on June 30, 1928. No order of dismissal of the amended bill was made until that

time. When the court on June 30, 1927, sustained the motion to dismiss on the ground that the suit was barred, it could not dismiss the amended bill and at the same time transfer the suit to the law side. It did the latter. Transference from law to equity (U. S. Code, Section 397) is neither a final order nor decision nor an interlocutory order from which an appeal can be taken. Weaver v. Atlas Oil Co., 39 Fed. (2d) 847. In that respect we see no difference when the transfer is made under equity rule.

As already said, the complaint on the law side is a copy of the amended bill on the equity side. In the amended bill the appellant prayed for equitable relief, special and general. The complaint on the law side asked for relief at law, damages. Appellees insist that when appellant filed its complaint on the law side and prosecuted that remedy until the court on general demurrer held the complaint bad, it was an election of remedies; that it could not then go back to equity; and that by its procedure in seeking relief at law it elected and was bound to pursue that remedy. But appellant did not of its own choice seek relief at law. Its choice was in equity, and under protest it followed its case from equity to law on the court's order; and when the court ruled against it there, it asked and was granted permission to return to its choice, the equity side. Henderson Tire & Rubber Co. v. Gregory, 16 Fed. (2d) 589. One other point requires consideration. Appellees say the court was right in applying the statutory bar. Counsel for appellant reply that it may be conceded, arguendo, that the limitation statute applies to titles by certification (which they deny), as well as to titles by patent, still the court erred, because the frame of the amended bill entitled appellant to a decree that the Sugar Company took and has held the legal title as trustee ex maleficio for appellant, and the three defendants are liable for the limestone taken. This view, if sustained, renders the plea of limitation of six years in which to sue bad, for the uncancelled certification is no obstacle to the trusteeship which equity imposed when title was taken with notice of the fraud. The opinion in Lockhart v. Leeds, 195 U. S. 427, sustains appellant's contention on the point stated. See also Walden v. Bodley, 14 Peters 156, 164. The order dismissing the amended bill is reversed. The trial court will vacate that order and require answers.

McDERMOTT, Circuit Judge, concurring:

I concur in the opinion of the Court with serious misgivings. The United States parted with the legal title of the land involved on December 3, 1903. This action was commenced in 1926. The specific prayer is that the certification of 1903 be declared null and void, and that the United States be decreed to be the owner, and that it recover the possession of, the land. There is a prayer for general relief, but no specific prayer that the title be impressed with a trust.

Section 8 of the Act of March 3, 1891 (26 Stat. 1099, 43 U. S. C. 1166) provides that "suits by the United States to vacate and annul any patent * * * hereafter issued shall only be brought within six years after the date of the issuance of such patents." The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands. The statute applies although the patent was procured by fraud. United States v. Winona, etc., R. Co., 165 U. S. 463, 476. If this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action. And the Supreme Court has so held. In United States v. Chandler-Dunbar Co., 209 U. S. 447, 450, the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The government replied that the action was not one to vacate and annul a patent, but to quiet title. The defendant prevailed, the court holding that—

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of

the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title. True, the latter action saves the rights of bona fide purchasers; but those generally are saved by other sections of the statute. The situation is aggravated when, as in the case at bar, the form of the action is one to vacate the certification.

If it be assumed that the statute applies to certifications as well as patents (a question that has not been ruled by this Court), the conclusion that a suit to recover the lands may be maintained, notwithstanding the statute, is justified by two decisions of the Supreme Court. In Lockhart v. Leeds, 195 U. S. 427, 436, cited by Judge Lewis, it was held that a trust might be impressed upon land, notwithstanding there was no specific prayer therefor, and although such relief is at variance with the theory disclosed by the specific prayer of the bill. It is proper, therefore, to treat this bill as one seeking to impress a trust upon real estate. While the Amalgamated Sugar Company is entitled, as a constructive trustee, to the benefit of any statute of limitations, the Supreme Court has held, in United States v. New Orleans Pac. Ry. Co., 248 U. S. 507, that a statute similar to the one in question does not bar an action to impress a trust. That was an action by the United States to recover certain lands for the benefit of certain homestead claimants. The prayer was to cancel the patents or declare a trust. The Supreme Court disposed of the statute of limitations by holding:

> "As the patents were issued before, and the suits were brought more than five years after, the Act of March 2, 1896, c. 39, 29 Stat. 42, the prayer that the patents be cancelled must be put out of view and the alternative prayer—that the title under the patents be declared to be held in trust for the homestead claimants and the trust enforced—must be regarded as if standing alone."

It is suggested that Independent Coal & Coke Co., 274 U. S. 640, is to the same effect. But in that case the United States had been decreed to be the owner of the lands in an action brought within the statutory period, and the latter suit was in aid of the earlier decree. But the case of United States v. New Orleans Pac. Ry. Co., supra, is analogous on the facts, and the decision is clear-cut. While the result seems to be to

enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative, and therefore concur.

A true copy.
Attest:

(Seal) ALBERT TREGO,

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.